

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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LOCAL 8027 AFT-NEW HAMPSHIRE,  
AFL-CIO, ET AL.,

Plaintiffs.

v.

FRANK EDELBLUT, IN HIS OFFICIAL  
CAPACITY ONLY AS THE  
COMMISSIONER OF THE NEW  
HAMPSHIRE DEPARTMENT OF  
EDUCATION, ET AL.,

Defendants.

\* \* \* \* \*

No. 1:21-cv-1077-PB  
January 16, 2024

TRANSCRIPT OF TWO EXCERPTS FROM MOTION HEARING  
BEFORE THE HONORABLE PAUL J. BARBADORO

APPEARANCES:

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(Appearances continued next page)

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6   Official Court Reporter  
7   United States District Court  
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9   Concord, NH 03301  
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EXCERPT NO. 1

THE COURT: Well, is the Socratic method a teaching method?

MR. GARLAND: For sure, your Honor, in the abstract.

THE COURT: Are you teaching when you ask questions using the Socratic method?

MR. GARLAND: Yeah, I think you are, for sure.

THE COURT: When you ask questions of your students about white privilege, are you teaching it, even though you're not taking a view about white privilege; you're trying to get them to think about white privilege, what it means, is it real, what is the extent of it? If you ask questions, are you teaching?

MR. GARLAND: I think you are, your Honor, and I think that falls within the definitions that we've identified, that, still, it's some sort of affirmative and deliberate act designed to convey information. As I understood --

THE COURT: So, let me try a hypothetical on you. So, suppose a high school teacher is teaching Thoreau's book *Walden*, okay, a book near and dear to my heart, I grew up five miles away from Walden Pond, and there's a famous statement that Thoreau makes in that book: It's never too late to give up our prejudices. Suppose a teacher writes that on the board, and a student raises his hand and says, People can't give up their prejudices; they're inherent. What is the teacher

1       supposed to do in response to that to avoid losing their  
2       teaching license?

3               MR. GARLAND: I think a teacher may well have to  
4       consider adding context or disclaimer to that sort of  
5       statement, may have to identify that it is --

6               THE COURT: That's wrong? They have to affirmatively  
7       tell the student, That's wrong; that isn't true?

8               MR. GARLAND: I'm not saying that, your Honor.  
9       Something more general in the sense of that's one particular  
10      way of looking at it, and I think that's really where this  
11      starts to, in my mind, blur the vagueness inquiry and the  
12      policy inquiry. A lot of people of very good faith profoundly  
13      disagree that a teacher should have to do that.

14              THE COURT: Nothing in my ruling -- I don't take any  
15      position on whether any of the banned concepts are good or bad,  
16      should be in the curriculum, should not be in the curriculum.  
17      That's not my job. I say it's the responsibility of the State.  
18      I suggest that school boards are in a better position most  
19      often to do that, in conjunction with public hearings and so  
20      forth, but it's the State's responsibility, not mine, to  
21      declare whether concepts are good.

22              So, I don't take any position on should there be,  
23      should it allow, should it not be. I'm concerned about the  
24      vagueness of the statute and how teachers can lose their job,  
25      lose their teaching license, potentially be subject to damages

1 for not responding to a comment from a student in a classroom  
2 in the right way. That's my concern.

3 What can you tell me about whether in that  
4 hypothetical, what other context would you want to know that  
5 could give a teacher guidance about how to respond to a student  
6 that challenges Thoreau's statement that, It's never too late  
7 to give up our prejudices?

8 MR. GARLAND: I think the additional guidance that a  
9 teacher would need can be found in the statutes, and I think  
10 that goes down to Roman numeral I and the letter portions of  
11 the statutes, which is, if the statement is coming back of the  
12 kind you're describing, a teacher may well have to add a  
13 caveat, may well have to add a disclaimer, not a rejection of  
14 the notion, I don't think that's contemplated by the statutes,  
15 but may well have to make clear how it fits within the larger  
16 context of education. I think the statutes provide sufficient  
17 guidance on this, and I do think this is where, when we're  
18 talking about cases, that I would posit around the margins the  
19 fact that a teacher has to make those judgment calls does not  
20 mean the statute is vague.

21 THE COURT: Could a teacher in a high school civics  
22 class assign to students -- and I'm picking up specifically on  
23 something from the plaintiffs' brief, where they were picking  
24 up on something I said in my opinion about the affirmative  
25 action case -- could a teacher assign and have a class

1 discussion about Justice Sotomayor's dissent in that case?

2 MR. GARLAND: For sure, your Honor.

3 THE COURT: And they could talk about affirmative  
4 action and why reparations might be necessary, not just  
5 diversity promotion? They could talk about that, and that  
6 wouldn't in any way endanger a teacher for teaching,  
7 advocating, inculcating that one group should be preferred over  
8 another?

9 MR. GARLAND: No, I don't think it would run afoul of  
10 it, because the statutes don't simply prohibit what you just  
11 described, which is one group preferred over another. They  
12 prohibit the idea that --

13 THE COURT: I don't know if the plaintiffs will agree  
14 with you on that.

15 MR. GARLAND: I doubt they will, your Honor.

16 THE COURT: I don't think I'll agree with you on it  
17 either. I mean, I won't try to argue with you on it. But I  
18 think the banned concepts can be read to encompass that, that  
19 one group should be -- it is wrong that one group should be  
20 preferred over another based on their race, for example.

21 MR. GARLAND: I don't agree with that, your Honor, but  
22 the point that I -- the main point that I would make in  
23 response to that focuses on the word "could" have that you just  
24 used, because I do think a lot of what we're talking about and  
25 part of the peril in hypotheticals is it is a question of

1     could, and it's a question of could in cases that are on the  
2     margins, could this violate it.

3             You resisted the notion in the earlier argument, and I  
4     remember it well, that you can rewrite the statute, and I'm not  
5     advocating that you can, but what you can do, sitting in the  
6     context of a federal judge looking at state law, is you can try  
7     to divine what the Supreme Court, New Hampshire Supreme Court,  
8     would do, again using its rules of construction, and one of its  
9     rules of construction is construing language, if it is  
10    susceptible of a reading that's broader that creates a  
11    constitutional problem and susceptible to narrow  
12    construction --

13                     (End of excerpt)

14    (Proceedings continued on the record that are not included in  
15    this excerpt transcript)

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17                     EXCERPT NO. 2

18             THE COURT: Well, how about the concept of structural  
19    racism? You understand what that term is understood to mean,  
20    right?

21             MR. GARLAND: Yes.

22             THE COURT: Doesn't structural racism -- don't you,  
23    engaging in discussions about structural racism, can they not  
24    be discussions about how discrimination can evolve into  
25    intolerance over time?



1 MR. GARLAND: I would say they certainly can, your  
2 Honor, but, as I understand the concept of structural racism,  
3 it doesn't get into the sort of inherent  
4 superiority/inferiority, inherent racism, sexism, et cetera,  
5 that the statute contemplates. That's something far narrower,  
6 it's something biological, innate, not just simply something  
7 that would be more cultural or learned behavior, and I think  
8 that is reflected in the AG opinion, it's reflected in our  
9 briefing, and that's the distinction. You can certainly teach  
10 about the concept. I don't understand structural racism to say  
11 person X is white and therefore was born racist, which I think  
12 is where you would start to cross the line with the statute.

13 THE COURT: And you would say teachers have no trouble  
14 teaching implicit bias training in their classroom, implicit  
15 bias, linking them to the famous website where you can engage  
16 in questions and get an implicit bias score? None of that  
17 could in any way cross into the line of being impermissible, in  
18 danger of violation of the statute? Is that your view?

19 MR. GARLAND: It may well, again, require a teacher to  
20 identify what they're not providing the information to do, and  
21 the teacher may well have to say, and this is, again, trying --

22 THE COURT: What if a student says, The implicit bias  
23 data tells us that we're inherently biased; we can't avoid our  
24 discriminatory thinking? That isn't my view of what the  
25 implicit bias data suggests, but students are going to raise

1 those kinds of concerns. Are you saying that, unless they give  
2 what you call a disclaimer, they have to correct the student,  
3 essentially; otherwise they will be in violation?

4 MR. GARLAND: Well, I think it depends on how the  
5 student raises it. I think if a teacher were to provide  
6 implicit bias training or to teach about implicit bias, and a  
7 student were to run home and say, The teacher taught me that I  
8 am inherently racist, I don't think that's a violation. I  
9 think that perhaps could result in a complaint, but that's the  
10 sort of thing that would be weeded out based on the constraints  
11 that are in the statute. I think if a student, going back to  
12 your initial hypothetical, were to bring it up to the teacher  
13 in class, a teacher might have to consider how to contextualize  
14 that statement.

15 (End of excerpt)

16 (Proceedings continued on the record that are not included in  
17 this excerpt transcript)

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C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my knowledge, skill, ability and belief, a true and accurate transcription of the within proceedings.

Date: 5/28/24      /s/ Brenda K. Hancock  
Brenda K. Hancock, RMR, CRR  
Official Court Reporter